UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON DC

COMPREHENSIVE CARE OF OAKLAND LP, dba BAY AREA HEALTHCARE CENTER, Employer, and CAYETANO SANCHEZ, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION—UNITED HEALTHCARE WORKERS-WEST (SEIU-UHW), Union.	Case 32-RD-134177

BAY AREA HEALTHCARE CENTER'S ANSWERING BRIEF TO UNION'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS

Pursuant to Section 102.69(e) of the NLRB's Rules and Regulations, Bay Area Healthcare Center (the "Employer") submits this brief in opposition to SEIU-UHW's (the "Union") Exceptions and Brief in Support of Exceptions to Hearing Officer's Report on Objections. The Union's exceptions should be overruled because the Union has not met its burden of showing the Hearing Officer erred in overruling all of the Union's remaining objections[1] to the February 18, 2015 election. Based on all of the testimony and evidence

[1] The only objections before the Hearing Officer were Objection Nos. 19-22 because the remaining objections had either been summarily overruled by the Regional Director or withdrawn by the Union.

provided, including his assessment of the credibility of the witnesses, the Hearing Officer correctly determined that CEO Administrator Shirley Ma ("Ma") did not make any promises regarding wages or benefits during the critical period nor engage in any other conduct that reasonably tended to interfere with employees' free choice during the critical period leading up to the February 18 election. The Board should adopt the Hearing Officer's recommendations, overrule the Union's objections to the February 18, 2015 election, certify the election results, and decertify the Union as the bargaining representative.

ARGUMENT

A. Exception No. 1 – The Hearing Officer Correctly Applied Board Law Regarding Alleged Employer Promises During The Critical Period

The Union's first exception is that the Hearing Officer incorrectly cited to and applied several Board cases concerning the correct standard for employer statements regarding wages and benefits during the critical period. The Union tries to distinguish Board precedent based on factual nuances and distinctions that are irrelevant or simply unsupported by the record. For example, the Union argues that Ma testified about what a non-union BAHC facility would be like under her direction and asked employees to "give her a chance." This misstates Ma's testimony. While Ma did ask employees to "give her a chance," she never spoke to employees about what the *BAHC facility* would be like if the Union were decertified; rather, she simply discussed her previous experiences running a *non-union facility in Alameda.* (Tr. 60:4-61:7)

The Union's wordplay notwithstanding, the Hearing Officer was correct in ruling that statements by employers advising employees that "their current wages and benefits will stay the same regardless of the election results" is not objectionable conduct. (Report, p. 7.) Indeed, "[t]he Board has held that promises to maintain the status quo are not objectionable." *Crown Elec. Contracting, Inc.*, 338 NLRB 336, 336 n.3 (2002). This statement by the Board was made

without qualification or restriction. And yet the Union attempts to distinguish this situation from the cases cited by the Hearing Officer by noting insignificant factual nuances that are simply irrelevant to the analysis—i.e., the employer statements were made in response to employee inquiries. (Exceptions, pp. 1–2.) If the law were what the Union wants it to be, the Board could have and would have said so in its numerous opinions on point.

Moreover, the Union's cases are not more factually similar to the scenario at issue in this case. Indeed, in *Pacific Telephone Co.*, 256 NLRB 449 (1981), the statements made by the employer were significantly more severe than those at issue here. In *Pacific*, the employer agent commented to the employees that they did not need a union and that their wages and benefits would definitely be equal regardless of union representation. *Id.* at 449. There are no such assertions here. Ma made no statements whatsoever that wages and benefits would be the same regardless of Union representation to suggest that the employees did not need a union. Ma only told employees that rumors that she would cut wages and benefits were false, and that she could not make any promises with respect to wages and benefits. Tr. 64:7-21.

Likewise, *I.C. Refrigeration Service, Inc.*, 200 NLRB 687 (1972) is inapplicable to the present situation. In that case, the dispute was over economic benefits that were allegedly offered to employees to induce them to terminate their membership in the union. *Id.* at 695. Specifically, an employer agent told an employee that the employer would try to come up with a medical plan that was comparable to what the union could offer. *Id.* That is not even remotely similar to the statements purportedly made by Ma in this instance. It is clear from the facts in *I.C. Refrigeration* that the employer was indicating it *would change* its medical plan to induce the employee to end his relationship with the union. There has never been any such allegation made

here. Ma made no promises to change wages or benefits; rather, she said rumors about wage and benefits cuts were false and that she could not make any promises about the future. Tr. 64:7-21.

In sum, the Hearing Officer applied the correct legal standard and properly determined that Ma never made any promises regarding wage and benefits during the critical period, and the exception should be overruled.

B. Exception No. 2 – The Hearing Officer's Credibility Determinations Regarding Shelby Are Entitled To Deference

After considering the testimony and demeanor of the witnesses, the Hearing Officer found employee witnesses Funmi Akanbi ("Akanbi") and Petitioner Cayetano Sanchez ("Sanchez") to be the most credible witnesses when they offered testimony largely consistent with each other and Ma.[2] Significantly, the Hearing Officer found that Shop Steward Mary Shelby ("Shelby"), the only witness offered by the Union, lacked credibility. He based his determination not only on the fact that Shelby appeared extremely nervous, but also that her actual recollection of events lacked credibility (in part because she admittedly missed the first 30 minutes of the meeting when all the other witnesses agreed Ma spoke) and were inconsistent.

A Hearing Officer's determinations are given deference, particularly when they relate to the credibility of witnesses in instances where there are discrepancies in the testimony offered by various individuals. As the Board has stated on multiple occasions: "It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect." *Best Products Co., Inc.*, 269 NLRB 103, 103 n.2 (1984) (citing *Coca Cola Bottling Co. of Memphis*,

[2] While the Employer disagrees with the Hearing Officer's finding that Ma was not a credible witness, the Employer did not file its own exceptions to the Hearing Officer's Report because the Hearing Officer ultimately correctly concluded that Akanbi and Sanchez corroborated not only each other's testimony but also Ma's testimony, and found that the Employer did not make any promises of benefits during the February 16 meeting.

132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957)). Circuit courts have similarly noted that determinations by a hearing officer regarding credibility and demeanor "'may not be overturned absent the most extraordinary circumstances, such as utter disregard for sworn testimony or the acceptance of testimony which on its face is incredible.'" *Stripco Sales, Inc. v. NLRB*, 934 F.2d 123, 125 (7th Cir. 1991) (quoting *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 295 (7th Cir. 1983)).

In *Best Products*, the Board found no basis for disturbing the credibility determinations of the hearing officer. *Best Products*, 269 NLRB at 103 n.2; *see also Supervalu, Inc.*, 328 NLRB 52, 52 n.1 (1999) ("We rely on the hearing officer's implicit crediting of Stigall's testimony ..."). The Board should do the same here with regard to the Hearing Officer's credibility determinations. There are clearly no "extraordinary circumstances" justifying the Board to disregard the Hearing Officer's credibility determinations, particularly since the testimony of the other three witnesses corroborated each other and were in accord on the center issue that Ma never made any promises to employees on wages and benefits. As such, this exception should be overruled.

C. Exception No. 3 – The Hearing Officer Correctly Discredited Shelby's Testimony Because It Was Inconsistent

In finding that Shelby's testimony lacked credibility, the Hearing Officer relied on the inconsistent nature of Shelby's testimony that Ma allegedly promised employees that wages and benefits would remain the same and also that she would give them raises in March.[3] The

[3] Ma's testimony was clear that she never made any promises and only told employees that rumors of any alleged cut to wages and benefits were false. She never promised to provide employees raises in March, though some employees may have received raises due under the existing CBA as a result of a promotion or seniority anniversary date, or under the new Oakland minimum wage increase. Ma could not recall specifically who the affected employees may have been or how many employees could have actually received these specific wage increases off of memory. Tr. 66:11-18, 67:10-15, 88:8-90:14, 112:10-113:23, 114:24-115:21.

Union's exception to the Hearing Officer's findings is based on a misrepresentation of Shelby's testimony about what Ma allegedly said during the February 16 meeting. While the Union describes Shelby's testimony as stating that Ma promised "not to cut wages" and to provide a "wage increase in March," Shelby's testimony was actually quite different:

> Q What did Shirley say?
>
> A Shirley, well she's saying that -- first she say that the wage that they have planned and the benefit and all that was **gonna stay the same. Nothing was going to change.**
>
> Q You said she first said that. Did she say anything else?
>
> MR. PERETZ: Objection. Misstates her testimony.
>
> HEARING OFFICER GARBER: Can you repeat what she said?
>
> THE WITNESS: Uh-huh.
>
> HEARING OFFICER GARBER: Can you repeat what she said?
>
> THE WITNESS: What I said? Oh --
>
> HEARING OFFICER GARBER: What Shirley said regarding wages benefits --
>
> THE WITNESS: She said --
>
> HEARING OFFICER GARBER: -- and benefits.
>
> THE WITNESS: She -- wage, benefit and health plan and all that was **gonna stay the same. Nothing was going to change or nothing.**
>
> **HEARING OFFICER GARBER: Were those her exact words, do you recall or is that a summary of what she said?**
>
> **THE WITNESS: That's what her exact word that --**
>
> **Q BY MR. BOIGUES: Was her exact words?**
>
> **A Uh-huh.**
>
> Q Okay. Shirley said that. What else did say, if anything else?

A Well, that she was talking. She said that **we was gonna get a raise. And she -- she said it was going to be next month in March.** And that's when everybody start clapping and stuff.

Q You said everybody started clapping?

A Uh-huh.

Q Yes? You gotta make sure you say yes, so that --

A Yes.

Q Yes. Okay. **So Shirley said wages, health plan and benefits will stay the same. Nothing will change.**

A Yes.

Q She also said that you will get a raise the next month in March. Everybody started clapping.

A Yes.

Tr. 27:15-29:3 (emphasis added).

The Hearing Officer correctly determined that Shelby's testimony lacked credibility because it made no sense – it was unlikely that one minute Ma would promise employees that wages and benefits would stay the same, and then in the next minute promise a wage increase in March. The Union argues that the inconsistency should not be attributed to Shelby, but to Ma as the speaker. But Shelby was the only witness that testified about these alleged promises, as Ma denied making them, which was corroborated by Akanbi and Sanchez. Because Shelby's testimony regarding Ma's alleged promises is illogical and was not supported by the testimony of any other witnesses, the Hearing Officer correctly discredited Shelby's testimony and found that the alleged promises were not made. *Cintas Corp. & Unite Here*, 2006 WL 2725966 (finding management's account of what was said more credible than the "inconsistent testimony" of other witnesses); *Meyers Transport of N.Y., Inc.*, 2001 WL 1589734 (inconsistent testimony "reflects poorly" on a witness' credibility and damages any reliance that can be placed on it).

As noted above, the Hearing Officer's credibility determination is entitled to deference and should not be disturbed here. *Stripco Sales, Inc. v. NLRB*, 934 F.2d 123, 125 (7th Cir. 1991) (noting the difficult task faced by the hearing officer because of the inconsistent testimony from various witnesses (and occasionally the same witnesses), but upholding the Board's decision that was based on the hearing officer's credibility determinations); *N. Am. Enclosures, Inc. v. NLRB*, 213 F. App'x 2, 4 (D.D.C. 2007) (where there is inconsistent testimony, or testimony in conflict, the proper course is to defer to the findings of the hearing officer who had the opportunity to observe the witnesses and question them). Therefore, this exception should be overruled.

D. Exception No. 4 – The Hearing Officer Correctly Determined That Ma's Discussion Of False Rumors About Wage And Benefits Cuts Was Not A Promise

The Union's fourth exception argues that the Hearing Officer failed to give proper weight to alleged admissions by Ma about wages and benefits while she was "refuting rumors." As discussed above with respect to Exception No. 1, the Union misstates Ma's testimony as Ma never made any promises about future wages or benefits, and repeatedly told employees she could not make any promises. She simply told employees the rumors they were hearing were false. While Akanbi and Sanchez may not have recalled Ma discussing rumors during the employee meeting, their testimony corroborated Ma on the critical issue that she never made any promises regarding wages and benefits. Tr. 139:23-140:3; 144:1-145:3. Ma never made any "critical admission" and the Union's exception should be overruled.

E. Exception No. 5 – The Hearing Officer Correctly Determined That Akanbi And Sanchez Corroborated Ma On The Critical Issue of Alleged Promises Regarding Wages And Benefits

Closely related to Exception No. 4, the Union argues in Exception No. 5 that Akanbi's and Sanchez's testimony did not corroborate Ma simply because they did not recall her refuting rumors during the February 16 meeting which Ma testified that she did. While Akanbi and

Sanchez may not have a specific recollection of Ma addressing rumors, they did corroborate Ma's testimony on the central issue that she did not make any promises to employees regarding wages and benefits. Tr. 139:23-140:3; 144:1-145:3. That is what the Hearing Officer based his corroboration findings on and is the central issue in dispute here. That various witnesses had differing recollections over some immaterial details of the February 16 meeting does not undermine the clear consensus that Ma never made any promises to employees. The Union's exception on this point should be overruled.

F. Exception No. 6 – The Hearing Officer Correctly Determined That Shelby's Testimony Regarding What Ma Allegedly Said At The Meeting Lacked Credibility Since She Missed The First 30 Minutes Of The Meeting When Ma Spoke

In Exception No. 6, the Union takes the incredible position that the Hearing Officer erred in discrediting Shelby's testimony because she admittedly showed up 30 minutes after the start of the meeting and after all the other witnesses testified Ma spoke (during the beginning of the meeting). The Hearing Officer's finding is based on common sense – Shelby's testimony is unworthy of credence because Ma spoke first (or at the beginning) of the meeting so Shelby simply could not have heard what Ma said during this time. Shelby testified that when she showed up CNA Amanda Tarpeh ("Tarpeh") was speaking. Tr. 49:8-22, 152:19-24, 152:25-153:4. All of the other witnesses testified that Tarpeh spoke after Ma. Tr. 130:6-131:4, 132:13-35, 143:24-25, 145:4-21. Therefore, Shelby must have necessarily missed Ma's speech during the meeting. While Ma may have spoke briefly again during closing remarks to thank employees for coming, Ma, Akanbi, and Sanchez consistently testified that the substance of Ma's remarks were at the beginning of the meeting.[4] Tr. 139:16-140:19, 148:12-149:3, 151:6-10. For these

[4] The Union's reference in footnote 3 that Akanbi testified that "Michelle" spoke first is an obvious typo in the transcript, which is apparent when the witness answered the follow-up questions. Tr. 130:3-24.

reasons, Shelby missed Ma's speech and her testimony regarding Ma's comments lacks credibility and was properly discredited by the Hearing Officer in overruling this exception. His determination should stand.

G. Exception No. 7 – The Union Misconstrues The Testimony Regarding Managers' Alleged Efforts To Address Employee Concerns And Never Objected To The Election On That Basis

The Union never objected that the Employer improperly solicited employee grievances during the February 16 meeting, and cannot raise this argument for the first time now. NLRB Casehandling Manual § 11392.2(a)(2) and 11392.3. Regardless, the Union's argument has no merit and is based on a blatant attempt to twist the testimony about what Assistant Administrator Debbie Beyelia ("Beyelia") allegedly said during the employee meeting.

Shelby testified that in response to questions during the meeting regarding alleged rumors about Ma firing African Americans, Beyelia responded that if anyone had any problems in the future, they could come to her and she would try to solve it. Tr. 27:9-11, 154:1-12. Beyelia's general open door policy about theoretical issues in the future is far different than the promise of the employer in *Majestic Star Casino, LLC,* 335 NLRB 407 (2001) cited by the Union, wherein the employer promised to look into specific employee concerns regarding shift changes, pay, and scheduling raised during a pre-election campaign meeting. In *Majestic,* in finding the employer's conduct to be objectionable, the Board stated that while the employer had previously stated it could not make any promises, it did not tell employees *during that meeting* that it could not make any promises. In contrast here, Ma repeatedly told employees during the campaign and *during the February 16 meeting* that she and the other managers could not make any promises. Therefore, Beyelia's general comment that she was an available resource to employees with concerns in the future is not objectionable and does not warrant overturning the results of the election. This is particularly true since the Union lost by a wide margin (32 votes in favor of the

Union and 51 votes against Union representation) and there is no evidence this alleged statement influenced or coerced employees in exercising their vote. For all these reasons, this exception should also be overruled.

CONCLUSION

After weighing all of the evidence and testimony of the witnesses, the Hearing Officer correctly determined that Ma did not make any alleged promises regarding wages and benefits during the February 16 meeting and recommended to the Board that it certify the election results. The credibility determinations, findings, and recommendation made by the Hearing Officer deserve deference, should be followed by the Board, and the Union's exceptions overruled.

Dated: July 24, 2015

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On July 24, 2015, I served the following documents in the manner described below:

BAY AREA HEALTHCARE CENTER'S ANSWERING BRIEF TO UNION'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS

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☑	BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Polsinelli LLP's electronic mail system from dderivero@polsinelli.com to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 24, 2015, at San Francisco, California.

Debbie de Rivero